NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

Company Appeal (AT) (Ins.) 492 of 2019

[Arising out of the impugned order dated 08.03.2019 in I.A. No.41 of 2019 (preferred by the Appellant/ Applicant) in I.A. 259 of 2018 (filed by the Resolution Professional) in CP(IB) No.48 of 2017 passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench].

In the matter of:

Gail India Ltd. **....Appellant**

Vs.

Ajay Joshi (Resolution Professional of Alok Industries Ltd. & Ors.) **....Respondents**

Present :

For Appellant: **Mr. Sudhir K Makkar, Senior Advocate with Mr. Nishant Awana, Mr. Azmat H. Amanullah, Mr. G.S. Awana and Ms. Yogita Rathore, Advocates.**

For Respondents: **Mr. Vaijayant Paliwal, Ms. Charu Misra, Mr. Parth Gokhale, Mr. Nikhil Mathur, Advocates for R1.**
Mr. Ramji Srinivasan, Senior Advocate with Mr. Raghav Shankar, Mr. Raghav Chadha, Advocates for R2 & 3.
Mr. Prateek Kumar, Mr. Niranjan S. Rao, Mr. Madhav Khosla, Advocates for R4 (CoC)

J U D G M E N T
(Virtual Mode)

M. Venugopal (J)

PREAMBLE

The Appellant 'Gail India Ltd.' has preferred the present Appeal being dissatisfied with the impugned order dated 08.03.20219 in I.A. No.41 of 2019 (preferred by the Appellant/ Applicant) in I.A. 259 of 2018 (filed by the

Resolution Professional) in CP(IB) No.48 of 2017 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench.

2. The 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench) while passing the impugned order dated 08.03.2019 in I.A. No.41 of 2019 (preferred by the Appellant/Applicant in IA 259/2018(filed by Resolution Professional) in CP(IB) No.48 of 2017 at paragraph 20.1 to 29 had observed the following:

> *20.1 "During the pendency of IA 259 of 2018(filed for approval of Resolution Plan by the Resolution Professional), number of Intervention/Interlocutory applications are filed with various grievances, some of this are disposed of and some of those which have remained pending, are/were heard collectively for deciding I.A. No. 259 of 2018.*
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> *20.2 While proceeding further, it is pertinent to note that the Interlocutory applications are filed at much belated stage i.e. after the filing of I.A. No. 259 of 2018. The Resolution Plan was of dated 12th April, 2018 was approved by the CoC on 20th June, 2018. The applicants(Interveners) are/were well aware of their fate and position, as admitted in their applications but none of them approached this Adjudicating Authority on approval of plan by CoC i.e. on 20.06.2018 for redressal of their grievances, if any, and/or with any allegations(s) against the Resolution Applicant or against the CoC for not considering their clam while approving the Resolution Plan knowing fully that CIRP is a time bound process.*

20.3. The moment of IA No. 259 of 2018 is filed, all the above applicants have come as intervener, opposing the Plan. The applicants (Intervener Applicants) are not only delayed one but the conduct of the applicants goes on to show that they want to stall the proceedings for the reasons best known to them. Had there been any bonafide action/claim, they would have approached the Adjudicating Authority on the very threshold of rejection of their claim either by the RP or by CoC. There would have been no reason to sit on the fence such conduct itself shows the lack of bonafide on the part of the applicants (Interveners).

20.4 Further, it is specifically provided in the Code under section 30(2)(e) of the Insolvency and Bankruptcy that Resolution Plan should not contravene any of the provisions of law for the time being in force. As per Explanation Clause to section 30(2) of the Insolvency Code (inserted w.e.f. 06.06.2018) which read as under "For the purpose of Clause (e), if any approval or shareholders is required under the Companies Act, 2013(18 of 2013) or any other law for the time being in force for implementation of actions under the Resolution Plan, such approval shall be deemed to have been given and it shall not be a contravention of that Act or Law."

Under such circumstances, when the Code has provided that an act has to be performed in a particular manner, in that event, any deviation will attract illegality in approval of the Plan by the CoC so submitted by the Resolution Applicant. The Plan which has been approved by CoC in its commercial wisdom, looking to the

viability and feasibility of the business of Corporate Debtor cannot be interfered with. As per the Code, the Interveners/Applicants are entitled for liquidation value only and not more than that. But in the instant plan, petty operational creditors are considered, even otherwise, as per liquidation value, their claims fall under the category of 'NIL'.

20.5. Further, with regard to the allegation of discrimination between the creditors and their position, has also been clarified by the Hon'ble Supreme Court, in its judgement, in the matter of Swiss Ribbons Pvt. Ltd. & Ors. Vs. Union of India & Ors., wherein Hon'ble Apex Court, set out the distinction between 'financial creditors' and 'operational creditors' by observing that since the financial creditors are in the business of money lending, banks and financial institutions are best equipped to assess the viability and feasibility of the business of the corporate debtor. On the other hand, the operational creditors, who provide goods and services, are involved only in recovering amounts that are paid for selling goods and services and are typically unable to assess viability and feasibility of business.

In this regard, it is also appropriate to refer the Bankruptcy Law Reforms Committee (BLRC) which conceptualized the 'I&B'Code as under: "The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have

to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, 'Operational Creditors' are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the 'I&B' Code will provide that the creditors committee should be restricted only the 'Financial Creditors'.

20.6 That with regard to IA No. 41 of 2019 filed by the Gail India Limited, their status has already been considered as Operational Creditor in IA 413 of 2018. Thus, in the event, only liquidation value is payable to the operational creditors and such amount shall be paid in priority to the amount payable to the financial creditors. Further, Resolution Applicant has already clarified before the Adjudicating Authority, that there would be no demand for gas from the applicant of IA 41 of 2019 arising out of any prior obligation under Gas Sale Agreement dated 27.05.2013 (GSA) until the closing date. It is further categorically submitted by the Resolution Applicant that no gas has been availed of by the Corporate Debtor under GSA after January, 2014. However, if applicant wishes to continue supply to the Corporate Debtor, it may separately negotiable on the same with the Resolution Applicant and the same does not fall within the ambit of the Resolution Plan. The Resolution Applicant had already clarified the position.

20.7 It is pertinent to mention that as per the total financial outlay, the liquidation value payable/due to the operational creditors (other than workmen) is 'NIL'. Accordingly, the question of any priority payments being due to operational creditors does not arise at all. Hence, the question of discrimination in the Resolution Plan also does not arise at all. (to each of whom the Company, as on the insolvency Commencement Date), owes upto Rs. 3,00,000/- (Rupees three lakhs) and whose details are set out in (Annexure 9) shall be discharged.

20.8. On perusal of the records and the aforesaid reasons, we do not find that operational creditors are discriminated or there is any violation of Article 14 either on the grounds of equals being treated unequally or on the grounds of manifest arbitration.

20.9. It is a matter of record that before the amendment of Section 30(4) came into force, the Resolution Plan was approved, only with the majority of the CoC i.e. 72.192 per cent of voting in favour of the Resolution Applicant by the CoC, whereas the then requisite percentage of vote of CoC was 75 per cent. It is also a matter of record that the Alok Employees Benefit and Welfare Trust filed an IA being No. 135 of 2018 seeking approval of the Resolution Plan which was approved by 72.192 per cent only, when requisite criteria for approval of the Plan was 75 per cent i.e. prior to amendment, on the ground of the interest of employees, workers and other stakeholders, opposing the application filed by RP vide IA 136 of 2018 under Section 33(1) pf the Code with prayer for

passing an order of liquidation. At that point of time, SICOM Ltd., filing p-67 of 2018 made a prayer to get himself impleaded in the IA 135 of 2018, so as to object the prayer of Alok Employees Benefits and Welfare Trust made in IA 135 of 2018 which was made for approval of the Resolution Plan, even if it was voted by 72.192 per cent only which was less than the required percentage of voting of 75 per cent as against the then requisite criterial of voting.

However, when an amendment came in section 30(4) w..e.f. 06.06.2018, where percentage of voting of CoC was reduced from 75 percent threshold to 66 per cent, Resolution Plan was again sent for re-look to CoC vide order dated 11.06.2018 in view of the Ordinance 2018, consequent upon which IA 135 of 2018 and IA 136 of 2018 became infructuous. But the Applicant's rights in p-67 of 2018 were kept reserved for final hearing.

However, a provision has been made in the Total Financial Outlay of the Resolution Plan that in the event there are dissenting financial creditors, then the liquidation value due to the such dissenting financial creditors will be discharged out of the financial creditors settlement amount, in priority to any payments being made to the other financial creditors who voted in favour of the Resolution Plan.

On perusal of the entire Resolution Plan, we hereby notice that though there are / were heavy haircut, however, the Resolution Plan provides for payment of insolvency resolution process costs in

the manner specified by the Code, in priority to the repayment of the other debts of the Corporate Debtor and also provided for the payment of debts of operational creditors as per the waterfall mechanism mentioned under section 53 of the Code.

21. The present application i.e. IA No. 259 of 2018 has been filed for approval of the Resolution Plan under section 30(6) read with section 31(1) of the Code (as amended) read with Regulation 39(4) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (as amended for submission and approval of Resolution Plan submitted by JM Financial Reconstruction Company Limited, JMFARAC – March, 2018 – Trust and Reliance Industries Limited in respect of the Corporate Debtor.

21.1 The applicant / RP deliberating the sequence of events right from calling EOI up to approval of the Resolution Plan by the CoC in its sixteenth meeting held on 20.06.2018 submitted the Resolution Plan duly approved by the CoC and affirming that he has verified the contents of the Resolution Plan and confirmed that it complies with the requirements envisaged under Regulation 38 of the CIR Regulations as well as Section 30 of the Code, and sought for approval of the Resolution Plan by this Adjudicating Authority.

21.2 The Resolution Applicants in pursuance to the Public Notice dated July 19, 2017 submitted the Plan relating to the Insolvency resolution Process of Alok Industries Limited (Company)/ Corporate Debtor under

the provisions of Insolvency and Bankruptcy Code, 2016 and the rules and regulations issued thereunder.

21.3 On perusal of the Resolution Plan, it is found:

- *that total outstanding financial debt of the Company/Corporate Debtor admitted by the RP towards its financial creditors is Rs. 29614,66,79,258 (Rupees Twenty-nine Thousand Six Hundred and Fourteen Crores Sixty-six Lakhs Seventy-nine Thousand Two Hundred Fifty-eight) as set out in **Annexure D** of the **Information Memorandum**.*
- *That, the total outstanding operational debt of the Corporate Debtor Company admitted by the RP towards its operational creditors is Rs. 592,00,44,768 (Rupees Five Hundred Ninety-two Crores forty-four thousand seven hundred sixty-eight) as set out in **Annexure D** of the **Information Memorandum**.*
- *That, the total outstanding towards workmen and Employees Dues of the Company admitted by the Resolution Professional towards its employees and workmen, is Rs. 73,01,06,951/- (Rupees Seventy three Crores one lakh Six Thousand Nine Hundred Fifty-One) as set out in **Annexure I** as set in the **Information Memorandum**. As per the clarification, vide email dated March 8, 2018 of the Resolution Professional, this amount includes the amount due to the Company's workmen as on the insolvency commencement date (including the liquidation value to the company's workmen) amounting to Rs.19,33,00,000/- (Nineteen Crores Thirty-three Lakhs).*

*21.4 The Resolution Applicants have undertaken insolvency resolution of the Company/Corporate Debtor in the manner as stated in Clause 1.2 at Page No. 5 of the Resolution Plan under the head — "**Key steps of the Plan**" which is the part and parcel of the Resolution Plan as well as the application. The said Resolution Plan also includes the distribution of financial outlay in Clause No. 1.3 at Page 14 under the head **"Distribution of Financial Outlay"** which gives the details in the order of priority and the payments thereof proposed to be made to the members, shareholders and all stakeholders etc. For the sake of convenience, the same is reproduced herein below:*

Clause 1.3 Distribution of the Total Financial Outlay:

The order of priority of distribution using the Total Financial Outlay, is set out below:

Order of Priority	***Total Financial Outlay***	***Amount (in Rs.) (in Crores)***
First	*Estimated CIRP Costs.*	*234 or any lower amount*
Second	*Excess CIRP Costs to be determined in terms of Section 3.2.2*	
Third	*Liquidation value and other dues owed to workmen.*	*19.33*

Fourth	*Liquidation value due to Operational Creditors (other than workmen) is NIL. Consequently, amount required to be paid to Operational Creditors for Liabilities until the Insolvency Commencement Date is NIL.* *However, as part of this Plan it is being proposed that the dues owed by the Company to certain Operational Creditors (to each of whom the Company, as on the Insolvency Commencement Date, owes up to Rs.3,00,000 (Rupees Three lakhs) and whose details are set out in (Annexure 9), shall be discharged.*	
Fifth	*Liquidation value due to the dissenting Financial Creditors (if any). For the purposes of the financial proposal, we have assumed that there are*	

	no dissenting Financial Creditors. *Note 1: In the event there are dissenting Financial Creditors then the liquidation value due to such dissenting Financial Creditors will be discharged out of the Financial Creditors Settlement Amount, in priority to any payments being made to the other Financial Creditors who vote in favour of the Plan.*	
Sixth	*Subject to the adjustments in Section 3.2.2 of this Plan, payment of the Financial Creditors Settlement Amount*	*5,052*
Seventh	*Need based working capital of the Company and any payment towards Outstanding Workmen and Employee Dues as per the provisions of this Plan, excluding any amounts paid towards the*	*441.84*

	liquidation value of workmen as stated under the third step above (it being clarified that (i) no payments shall be made to any employee belonging to the Existing promoter Group, and (ii) all accrued but unpaid statutory dues owed by the Company with respect to any of its employees not belonging to the existing Promoter Group shall be paid in accordance with this Plan). *Note 2: Please note that payments to and by the Company under any supply and offtake arrangement with RIL will be made to augment and meet the additional working capital requirements of the Company.* *Note 2: This amount shall stand reduced by an amount determined*	

	in accordance with Section 1.2(v)(b)(A) of this Plan towards any Excess CIRP Costs,	
Eighth	*Capital expenditure of the Company*	*500*
	TOTAL FINANCIAL OUTLAY	***6,252***

Note: In the Resolution Plan, the total financial outlay is written as Rs.6,252 crores whereas the actual total comes to Rs. 6,247.17 crores.

22. At this juncture, we find it expedient to refer section 53 of the Code i.e. distribution of assets:

Section 53(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: -

i. The insolvency resolution process costs and the liquidation costs paid in full;

ii. The following debts which shall rank equally between and among the following: -

iii. Workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(i) Debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(ii) Wages and any unpaid dues owned to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(iii) Financial debts owed to unsecured creditors;

(iv) The following dues shall rank equally between and among the following:

(i) Any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(v) Any remaining debts and dues;

(vi) Preference shareholders, if any; and

(vii) Equity shareholders or partners, as the case may be.

(2) Any contractual arrangement between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of

recipients under sub-section (1), and the proceeds to the relevant recipients shall be distributed after such deduction.

Explanation — For the purpose of this section —

(a) It is hereby clarified that at each stage of the distribution of proceeds in a class of recipients that rank equally, each of the debts will paid in full, or will be paid in equal proportion within the same proceeds are insufficient to meet the debts in full; and

(b) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).

23. *Thus, Section 53 of the Code lists the priorities to be given to the beneficiaries, of liquidation value of the assets of the Corporate Debtor. The provisions of Section 53 make it amply clear that Operational Creditors are at the end of the list of beneficiaries as the Secured Financial Creditors have edge over the others.*

24. *It would also be pertinent to mention here that Operational Creditors have no locus standi as far as approval of the Resolution Plan by the COC is concerned. As per Section 24(3)(C), they are not eligible to attend and vote at the meetings of COC if they are holding less than 10% of the total debt.*

Section 24(3) of the Code reads as under:

Section 24:

(3) The Resolution Professional shall give notice of each meeting of the committee of creditors to —

(a) *member of [Committee of creditors, including the authorized representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5)];*

(b) *members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;*

(c) ***operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt***.

25. To decide the issue, it will be pertinent to notice the very object of the 'IB Code', 'Resolution' and Role of COC.

The objective of the 'I&B Code'

"The objective of the Insolvency and Bankruptcy Code, 2016 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders including alteration in the priority of the payments of the government dues, to establish an Insolvency and Bankruptcy Fund and matters connected therewith or incidental thereto.

Thus, the preamble of the I&B Code aims to promote resolution over liquidation.

The purpose of resolution is maximization of value of assets of the 'Corporate Debtor' and thereby for all creditors. It is not maximization of value for a 'stakeholder' or 'assets of a stakeholder' such as creditors and to promote entrepreneurship, availability of credit and balance the interests. The first objective is 'resolution'. The second objective is 'maximization of the value of assets of the 'Corporate Debtor' and third objective is 'promoting entrepreneurship, availability of credit and balancing the interests'. This objective of the I&B Code is sacrosanct.

The said objective of the I&B Code is also affirmed by the ***Hon'ble Supreme Court in Arcelor Mittal India Pvt. Ltd. Vs. Satish Kumar Gupta and Ors.*** *wherein the Hon'ble Supreme Court observed that "the Corporate Debtor consists of several employees and workmen whose daily bread is dependent on the outcome of the CIRP. If there is resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible.*

The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, color and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the '185B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximize the value of assets of the

'Corporate Debtor', and should promote entrepreneurship, availability of credit and balance the interests of all the stakeholders.

*Looking to the object of IBC as well as the Legislative intent, it is amply clear that the "**Resolution is Rule and the Liquidation is an Exception**". Liquidation brings the life of a corporate to an end. It destroys organizational capital and renders resources idle till reallocation to alternate uses. Further, it is inequitable as it considers the claims of a set of stakeholders only if there is any surplus after satisfying the claims of a prior set of stakeholders fully. The 1B Code', therefore, does not allow liquidation of a corporate debtor' directly. It allows liquidation only on failure of corporate insolvency resolution process. It rather facilitates and encourages resolution in several ways.*

*The said objective of the Resolution Plan is affirmed in the decision in the matter of **K. Sashidhar Vs. Indian Overseas Bank Ors**. The Supreme Court has observed that National Company Law Tribunal has no jurisdiction and authority to analyse or evaluate the commercial decision of the Committee of Creditors (COC) to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors.*

Keeping in view such object behind the enactment of the Code, intention of the Legislature is, that priority is to be given to the resolution than liquidation in the larger interests of the public: workmen, stakeholders and the other employees of the Corporate Debtor in the interest of justice and in order to achieve the object of the Code, liquidation of a company

can only be a last resort wherein, all efforts for brining Resolution Plan were failed or it cannot be found workable in the larger public interest. Hence, now the approval of Resolution Plan by this Adjudicating Authority is rule as per the apex court's decision in the matter of ***K. Sashidhar Vs. Indian Overseas Bank & Ors*** *as discussed above.*

The Hon'ble Supreme Court in its recent judgment in Civil Appeal No. 10673 of 2018 in ***K. Sashidhar Vs. Indian Overseas Bank & Ors.*** *Comprising of Hon'ble Justice A.M. Khanwilkar and Hon'ble Justice Ajay Rastogi observed that:*

"33. As aforesaid, upon receipt of a "rejected" resolution plan the adjudicating authority (NCLT) is not expected to do anything more; but is obligated to initiate liquidation process Under Section 33(1) of the I & B Code. The legislature has not endowed the adjudicating authority (NCLT) with the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. From the legislative history and the background in which the I & B Code has been enacted, it is noticed that a completely new approach has been adopted for speeding up the recovery of the debt due from the defaulting companies."

"39. In our view, neither the adjudicating authority (NCLT) nor the appellate authority (NCLAT) has been endowed with the

jurisdiction to reverse the commercial wisdom of the dissenting financial creditors and that too on the specious ground that it is only an opinion of the minority financial creditors. The fact that substantial or majority per cent of financial creditors have accorded approval to the resolution plan would be of no avail, unless the approval is by a vote of not less than 75% (after amendment of 2018 w.e.f. 6-6-2018, 66%) of voting share of the financial creditors. To put it differently, the action of liquidation process postulated in Chapter III of the I&B Code, is avoidable, only if approval of the resolution plan is by a vote of not less than 75% (as in October 2017) of voting share of the financial creditors. Conversely, the legislative intent is to uphold the opinion or hypothesis of the minority dissenting financial creditors. That must prevail, if it is not less than the specified per cent (25% in October 2017; and now after the amendment w.e.f. 6-6-2018, 44%). The inevitable outcome of voting by not less than requisite per cent of voting share of financial creditors to disapprove the proposed resolution plan, de jure, entails in its deemed rejection.

"35. Whereas, the discretion of the adjudicating authority (NCLT) is circumscribed by Section 31 limited to scrutiny of the resolution plan "as approved" by the requisite per cent of voting share of financial creditors. Even in that enquiry, the grounds on which the adjudicating authority can reject the resolution plan

is in reference to matters specified in Section 30(2), when the resolution plan does not conform to the stated requirements. Reverting to Section 30(2), the enquiry to be done is in respect of whether the resolution plan provides: (i) the payment of insolvency resolution process costs in a specified manner in priority to the repayment of other debts of the corporate debtor, (ii) the repayment of the debts of operational creditors in prescribed manner, (iii) the management of the affairs of the corporate debtor, (iv) the implementation and supervision of the resolution plan, (v) does not contravene any of the provisions of the law for the time being in force, (vi) conforms to such other requirements as may be specified by the Board. The Board referred to is established under Section 188 of the I&B Code. The powers and functions of the Board have been delineated in Section 196 of the I&B Code. None of the specified functions of the Board, directly or indirectly, pertain to regulating the manner in which the financial creditors ought to or ought not to exercise their commercial wisdom during the voting on the resolution plan under Section 30(4) of the I&B Code. The subjective satisfaction of the financial creditors at the time of voting is bound to be a mixed baggage of variety of factors. To wit, the feasibility and viability of the proposed resolution plan and including their perceptions about the general capability of the resolution applicant to translate the projected plan into a reality. The resolution applicant may have given projections backed by

normative data but still in the opinion of the dissenting financial creditors, it would not be free from being speculative. These aspects are completely within the domain of the financial creditors who are called upon to vote on the resolution plan under Section 30(4) of the I&B Code.

26. In the backdrop of the settled position of law and the decision of the Apex Court in Swiss Ribbons Pvt. Ltd., and Ors. v. Union of India & Ors and K Sasidhar V. Indian Overseas Bank & Ors, as discussed herein above in the preceding paragraphs, Interlocutory Applications as referred and discussed above are not maintainable.

On perusal of the Resolution Plan, it is found that it meets the requirement of Section 31 r/ w Section 30(2) of the Code. Therefore, the present application ***IA 259 of 2018*** *is allowed subject to certain observation with regard to the Clause No. 3.2.3(iii) and clause No. 11 of Resolution Plan and sub para (n) of paragraph 33 along with the prayers (f) of paragraph 35 of* ***IA 259 of 2018*** *which cannot be allowed as these are the subject matter of the various Competent Authorities having their own jurisdiction.*

27. In this regard, this Adjudicating Authority is of the view that ***Clause No. 3.2.3(iii) at Page No. 19 of the Resolution Plan*** *viz. all legal proceedings initiated before any forum by Of on behalf of the financial creditors to enforce any rights or claims against the Company/ Corporate Debtor or enforce or invoke any security, interest and/ or guarantee, over the assets of the Company/ Corporate Debtor, shall immediately,*

irrevocably and unconditionally stand withdrawn, abetted, settled and/or extinguished. Provided however any rights or claims of the financial creditors with respect to Existing Promoters Guarantees shall continue against such guarantors". Approval of the Resolution Plan does not mean automatic waiver or abetment of any legal proceedings which are pending by or against the Company/Corporate Debtor as those are the subject matter of the concerned Competent authorities having their proper/ own jurisdiction to pass any appropriate order as the case may be. The Resolution Applicants on approval of the Plan may approach the Competent Authorities/ Courts/ Lega1 Forums/ Offices - Govt. or Semi Govt. State or Central Govt. for appropriate relief(s) sought for in Clause No. 3.2.3 (iii) of the Resolution Plan at Page No. 19.

28. Further with regard to Clause No. 11.1, 11.1.1 to 11.1.20 of the Resolution Plan, and the prayer (f) of the Clause No. 35 and pleadings, sub clause (n) of Clause No. 33 of application ***IA 259 of 2018****, wherein, the Resolution Applicant(s) pray(s) for passing of an appropriate order/ direction by this Adjudicating Authority for grant of relief, concession or dispensation or exemption, as the case may be, required for implementation of the transactions contemplated under the Resolution Plan in accordance with its terms and conditions detailed in Clause No. 11.1, 11.1.1 to 11.1.20 cannot be allowed, as those are the subject matter of the various concerned Competent Authorities and the jurisdiction lies upon them to make any concession, waiver, exemption and grant any relief. The Resolution Applicant(s) may approach to the Competent*

Authorities/ Government/ Semi Government/ Central and State Governments and k. other statutory bodies, as the case may be, as per the need and requirement for exemption, waiver and/or concession for the effective implementation of the Resolution Plan. This Resolution Plan cannot purportedly be used for getting any concession, waiver/ relief or exemption which is against the provisions of the existing laws of the land in force. The instant Resolution Plan cannot be used for the purpose which is against the Public Policy or contrary to the laws or in contravention of Sub Section 2(e) of Section 30.

28.1. Further, it is pertinent to mention herein that Resolution Applicant(s) itself in Clause No. 11.2 of the Resolution Plan has clarified that reliefs and the waivers as being sought for by the Resolution Applicant(s) as prayed for from the Adjudicating Authority, are not conditions to implementation of the Resolution Plan. The same are subject to the satisfaction of the conditions as set out in Section 9 of the Resolution Plan, even if, any of the waivers and reliefs sought under this Clause 11 of the Plan are not received or granted, the Resolution Applicant(s) will implement the Plan in accordance with its terms. Hence, Clause No. 9 of the Resolution Plan is also subject matter of the various Competent Authorities to whom Resolution Applicant(s) may approach.

28.2. Thus, not allowing the above said Clause No. 3.2.3 (iii) and Clause No. 11.1, 11.1.1 to 11.1.20 of the Resolution Plan, along with the prayers vide sub para (O of Paragraph No. 35 and pleadings made thereon in sub clause (n) of Paragraph No. 33 of application being ***IA No. 259 of 2018****,*

is not going to make any hindrance for proper implementation of the Resolution Plan as those are the subject matter of the concerned/ appropriate Competent Authorities. The Resolution Applicant(s) has/ have liberty to approach Competent authorities for any concession, relief, exemption or dispensation as the case may be.

28.3. It is further directed that:

i. The approved Resolution Plan shall come into force with immediate effect.

ii. The Resolution Plan shall be subject to the various existing laws in force and shall also confirms to such other requirements specified by the Board and other Statutory/Competent Authorities as the case may be.

iii. The Resolution Applicant(s) pursuant to the Resolution Plan approved under section 31(1) of the Code, shall obtain the necessary approvals required under any laws for the time being in force within a period of one year from the date of approval of the Resolution Plan by this Adjudicating Authority under section 31(1) of the Code or within such period as provided for in such law, whichever is later or as the case may be.

iv. The RP shall forward all records relating to the conduct of the corporate insolvency resolution process and Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded on its database.

29. As discussed hereinabove, and as also the view taken by the Hon'ble Supreme Court from time to time in Swiss Ribbons Pvt. Ltd & Ors vs. Union of India & Ors as well as K. Sashidhar Vs. Indian Overseas Bank & Ors. IA 259 of 2018 is allowed with above observations and the IAs mentioned herein below are not maintainable and dismissed the IA No.41/2019.

Appellant's Contentions

3. Assailing the validity, propriety and legality of the impugned order dated 08.03.2019 in I.A. No.259 of 2018 in CP(IB) No.48 of 2017 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Ahmedabad Bench), the Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had approved a 'Resolution Plan' which created a clause within a clause of 'Operational Creditor' and further that the 'Resolution Plan' of the Respondent Nos.2 and 3 provides for 100% payment to the 'Operational Creditors' having dues less than Rs.3 lakhs and provide a payment 'NIL' to the 'Operational Creditors' having dues over Rs.3 lakhs, which included the Appellant.

4. According to the Learned Counsel for the Appellant, the 'Resolution Plan' is unreasonably and arbitrary one as it fails to treat equals as equal and it also omits to provide any reasonable justification for such discrimination against the 'Operational Creditors' having dues over Rs.3 lakhs, including the Appellant and therefore, the 'Resolution Plan' is opposed to common sense besides the same, shocks the judicial conscious of the Tribunal. Added further, it is the fervent plea of the Learned Counsel for the Appellant that the impugned order approving the Plan fails to record any justification for such

differentiation between the same Clause of 'Operational Creditors' without there being any intelligible criteria to support the same.

5. It is represented on behalf of the Appellant that the 'Resolution Professional' (1st Respondent) is to ensure that the 'Resolution Plan' is in strict compliance with the provisions of the 'I&B' Code, 2016 and other applicable Regulations before placing the same before the 'Committee of Creditors' for its approval under Section 30(3) of the Code. As a matter of fact, as per Section 30(2) of the Code, the 'Resolution Professional' shall examine the each 'Resolution Plan' and ensure that it satisfies the fulfilment of the ingredients of Section 30(2) of the Code, which among other things mandates that the distribution in the proposed 'Resolution Plan' shall be fair and equitable.

6. Advancing his arguments, the Learned Counsel for the Appellant points out that the 'Adjudicating Authority' had completely lost sight of the fact that while approving the 'Resolution Plan', it is to record satisfaction that the 'Resolution Plan' satisfies the requirements as per Section 30(2) of the Code and that is a '"Sine qua non' for granting approval to any 'Resolution Plan' approved by the 'Committee of Creditors'.

7. The Learned Counsel for the Appellant proceeds to point out that the approval of the 'Resolution Plan' runs contrary to the law laid down by the catena of judgments of this Tribunal. In this regard, the Learned Counsel for the Appellant adverts to the decision in the matter of '**Binani Industries Limited and Ors.' Vs. 'Bank of Baroda and Ors.' Reported in (2018) 150 SCL 703** wherein this Tribunal was pleased to hold that 'any 'Resolution Plan' if shown to be discriminatory against one or other Financial Creditors or the

Operational Creditors, such plan can be held to be against the provisions of the I&B Code, 2016.

8. The Learned Counsel for the Appellant submits that in the matter of **'J.R. Agro Industries Pvt. Ltd.' vs. 'Swadisht Oils Pvt. Ltd.' reported in (2018) 147 CLA 260, the National Company Law Tribunal, Allahabad Bench** had observed the following:

> "*All the operational creditors are rank equal. Therefore, there should be no discrimination in distribution of the payment among the same class of creditors. Therefore, the part of the Resolution Plan which discriminates the distribution liquidation value amongst Operational Creditors is unsustainable in law. This portion of the plan needs modification.*"

and projects an argument that the Adjudicating Authority had not discussed the aforesaid judgment(s) and approved the 'Resolution Plan', which is incorrect in the eye of law.

9. The Learned Counsel for the Appellant takes a stand that the Appellant (being an Operational Creditor without any voting rights in the 'Committee of Creditors') was placed at a disadvantageous by disentitling it of any payments under the 'Resolution Plan' in respect of its lawful/ legitimate claims.

10. The Learned Counsel for the Appellant brings it to the notice of this Tribunal the 'Adjudicating Authority' (same Bench - National Company Law Tribunal, Ahmedabad Bench) on 08.03.2019 had approved a 'Resolution Plan' in the 'Corporate Insolvency Resolution Process' of 'Essar Steel' wherein, the I.A. 472 of 2018 (of the Appellant) was partly allowed and asked 'Committee of Creditors' to give 15% of the received Plan value to through the 'Operational

Creditors' on pro-rata basis, whose claim are treated as NIL because of being more than one crore. Consequently, the Appellant received some amounts under the similar gas supply agreement in the case of 'Essar Steel' but will have to forgo its claim in the resolution of the 'Corporate Debtor' (Alok Industries Limited).

11. The Learned Counsel for the Appellant refers to the judgment of the **Hon'ble Supreme Court in 'Essar Steel India Limited' 'Committee of Creditors' vs. 'Satish Kumar Gupta' reported in (2020) 8 SCC 531** wherein at paragraph 73 it is observed as under:

> " 73. *There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors."*

12. The Learned Counsel for the Appellant comes out with a plea that the 'Adjudicating Authority' and the Respondents had failed to appreciate and apply the 'equality' principle which was reiterated and upheld in the judgment of ***Hon'ble Supreme Court in 'Essar Steel India Limited', 'Committee of Creditors' case (2020) 8 SCC*** at page 531 wherein at paragraph 88 to 90 it is observed that *'equal treatment'* is to be accorded to each creditor depending upon the class to which it belongs to *'Secured'* or *'Unsecured'*, *'Financial'* or *'Operational'*.

13. The Learned Counsel for the Appellant contends that the 'Adjudicating Authority' while rejecting the contentions and grounds of the Appellant had relied on the judgment of the ***Hon'ble Supreme Court in 'Swiss Ribbons Private Limited & Anr.' Vs. 'Union of India and Ors.' (W.P. (C) No.99 of 2018 decided on 25.01.2019)*** mainly on the ground that as per the judgment of **Hon'ble Supreme Court in 'Swiss Ribbons'** case that distinction between the 'Financial Creditors' and 'Operational Creditors' was held to be valid under the 'I&B' Code and relied on the ***'Bankruptcy Law Reforms Committee Report' (BLRC),*** which has conceptualised for creation of the 'Committee of Creditors' comprising of only the 'Financial Creditors' and not the 'Operational Creditors'.

14. The Learned Counsel for the Appellant submits that the 'Adjudicating Authority' had failed to take into account that the **Hon'ble Supreme Court Judgment in Swiss Ribbons** case does not discuss the basic contention of the Appellant that the Appellant seeks to create a classification without any intelligible criteria that make the Plan grossly *'inequitable'* and fundamentally oppose to their spirit and intent of the legislation, more particularly, the fundamental theme of the 'I&B' Code, 2016 that is balancing of interest of all stakeholders.

Appellant's Citations

15. In the judgment of this **Tribunal dated 14.11. 2018 in Comp. App. (AT) (INS.) 82 of 2018 in the matter of 'Binani Industries' vs. 'Bank of Baroda and Anr.' at paragraph 17**, it is observed as under:

"17. To decide the issue, it will be desirable to notice the object of the 'I&B Code', object of 'Resolution' and what is expected from the 'Committee of Creditors', as summarized below:-

1. The objective of the 'I&B Code:

As evident from the long title of the 'I&B Code', it is for reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders. The recent Ordinance explicitly aims to promote resolution over liquidation.

2. The objective of the 'I&B Code' is Resolution.

The Purpose of Resolution is for maximisation of value of assets of the 'Corporate Debtor' and thereby for all creditors. It is not maximisation of value for a 'stakeholder' or 'a set of stakeholders' such as Creditors and to promote entrepreneurship, availability of credit and balance the interests. The first order objective is "resolution". The second order objective is "maximisation of value of assets of the 'Corporate Debtor'' and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objective is sacrosanct.

In the matter of "Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta and Ors.", the Hon'ble Supreme Court observed that "the 'Corporate Debtor' consists of several employees and workmen whose daily bread is

dependent on the outcome of the CIRP. If there is a resolution applicant who can continue to run the corporate debtor as a going concern, every effort must be made to try and see that this is made possible".

3. 'Financial Creditors' as members of the 'Committee of Creditors' and their Role.

a. The Bankruptcy Law Reforms Committee (BLRC), which conceptualised the 'I&B Code', reasoned as under:

i. Under Para 5.3.1, sub-para 4, the BLRC provided rationale for 'Financial Creditors' as under:

"4. Creation of the creditors committee ...

The Committee deliberated on who should be on the creditors committee, given the power of the creditors committee to ultimately keep the entity as a going concern or liquidate it. The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, 'Operational Creditors' are neither able to decide on matters regarding the insolvency of the entity, nor willing to take the risk of postponing payments for better future prospects for the entity. The Committee concluded that for the process to be rapid and efficient, the 'I&B Code' will provide that the creditors committee should be restricted to only the 'Financial Creditors'.

ii. In Para 3.4.2 dealing with 'Principles driving design', the principle IV reads as under:

"IV. The 'I&B Code' will ensure a collective process.

9. The law must ensure that all key stakeholders will participate to collectively assess viability. The law must ensure that all creditors who have the capability and the willingness to restructure their liabilities must be part of the negotiation process. The liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution."

b. The 'I&B Code' aims at promoting availability of credit. Credit comes from the 'Financial Creditors' and the 'Operational Creditors'. Either creditor is not enough for business. Both kinds of credits need to be on a level playing field. 'Operational Creditors' need to provide goods and services. If they are not treated well or discriminated, they will not provide goods and services on credit. The objective of promoting availability of credit will be defeated.

c. The 'I&B Code' is for reorganisation and insolvency resolution of corporate persons, ...for maximisation of value of assets of such persons to.... balance interests of all stakeholders. It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the 'Corporate Debtor'. One cannot balance interest of all stakeholders, if resolution maximises the value for a or a set of

stakeholder such as 'Financial Creditors'. One or a set of stakeholders cannot benefit unduly stakeholder at the cost of another.

d. The 'I&B Code' prohibits any action to foreclose, recover or enforce any security interest during resolution period and thereby prevents a creditor from maximising his interests.

e. It follows from the above:

i. *The liabilities of all creditors who are not part of 'Committee of Creditors' must also be met in the resolution.*

ii. *The 'Financial Creditors can modify the terms of existing liabilities, while other creditors cannot take risk of postponing payment for better future prospectus. That is, 'Financial Creditors' can take haircut and can take their dues in future, while 'Operational Creditors' need to be paid immediately.*

iii. *A creditor cannot maximise his own interests in view of moratorium.'*

iv. *If one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit.*

v. *The 'I&B Code' aims to balance the interests of all stakeholders and does not maximise value for 'Financial Creditors'.*

vi. Therefore, the dues of creditors of 'Operational Creditors' must get at least similar treatment as compared to the due of 'Financial Creditors'.

3. 'Resolution Plan'

The 'I&B Code' defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern. It does not spell out the shape, colour and texture of 'Resolution Plan', which is left to imagination of stakeholders. Read with long title of the 'I&B Code', functionally, the 'Resolution Plan' must resolve insolvency (rescue a failing, but viable business); should maximise the value of assets of the 'Corporate Debtor', and should promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders.

It is not a sale. No one is selling or buying the 'Corporate Debtor' through a 'Resolution Plan'. It is resolution of the 'Corporate Debtor' as a going concern. One does not need a 'Resolution Plan' for selling the 'Corporate Debtor'. If it were a sale, one can put it on a trading platform. Whosoever pays the highest price would get it. There is no need for voting or application of mind for approving a 'Resolution Plan', as it will be sold at the highest price. One would not need 'Corporate Insolvency Resolution Process', 'Interim Resolution Professional', 'Resolution Professional', interim finance, calm period, essential services, Committee of Creditors or 'Resolution Applicant' and detailed, regulated process for the purpose of sale. It is possible that under a 'Resolution Plan', certain rights in the

'Corporate Debtor', or assets and liabilities of the 'Corporate Debtor' are exchanged, but that is incidental.

It is not an auction. Depending on the facts and circumstances of the 'Corporate Debtor', 'Resolution Applicant' may propose a 'Resolution Plan' that entails change of management, technology, product portfolio or marketing strategy; acquisition or disposal of assets, undertaking or business; modification of capital structure or leverage; infusion of additional resources in cash or kind over time; etc. Each plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.

It is not recovery: Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. When creditors recover their dues – one after another or simultaneously- from the available assets of the firm, nothing may be left in due course. Thus, while recovery bleeds the 'Corporate Debtor' to death, resolution endeavors to keep the 'Corporate Debtor' alive. In fact, the 'I&B Code' prohibits and discourages recovery in several ways."

16. Also, in the aforesaid judgment wherein at paragraph 18 to 23, 29, 43, 48 it is observed as under:

"18. To decide the question whether the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' is discriminatory and against the provisions of the 'I&B Code', it is desirable to notice the financial terms of the 'Resolution Plan' of the 'Rajputana Properties Private Limited' gist of which has been produced by Mr. Arun Kathpalia, learned Senior Counsel and is as follows:

"FINANCIAL TERMS OF RESOLUTION PLAN OF RPPL

S. No.	***Particulars***	***Verified Claim (in Rs. Crores)***	***Proposed Payment***	***Interest as on 30.04.2018***
1.	*Insolvency Resolution Process Cost*	*115.91 (114.08 was revised by CoC)*	*115.91*	*NA*
2.	*Workman Wages*	*18.01*	*18.01*	*NA*
FINANCIAL CREDITORS WITH DIRECT EXPOSURE TO CORPORATE DEBTOR				
3.	*Edelweiss Asset Reconstruction Company*	*2775.82*	*2775.82*	*217.63*
4.	*IDBI Bank*	*335.85*	*335.85*	*26.33*
5.	*Bank of Baroda*	*427.69*	*427.69*	*33.53*
6.	*Canara Bank*	*370.34*	*370.34*	*29.03*
7.	*Bank of India*	*94.66*	*94.66*	*7.42*
8.	*State Bank of India*	*36.89*	*36.89*	*2.89*
9.	*Oriental Bank of Commerce*	*0.72*	*0.72*	*0.06*
FINANCIAL CREDITORS TO WHOM CORPORATE DEBTOR WAS A GUARANTOR				

10.	*IDBI Bank Limited (Dubai Branch)*	*1567.45*	*1567.45*	*Interest will be paid @10% p.a. quarterly rests if the same is not being paid to the creditor.*
11.	*Export Import Bank of India*	*619.95*	*619.95*	*48.60*
12.	*State Bank of India (Hong Kong)*	*36.82*	*36.82*	*Interest will be paid @10% p.a. quarterly rests if the same is not being paid to the creditor.*
13.	*Bank of Baroda (London)*	*171.57*	*171.57*	*13.45*
14.	*State Bank of India (Bahrain)*	*24.56*	*24.56*	*1.93*
15.	*Syndicate Bank*	*7.05*	*7.05*	*0.55*
OPERATIONAL CREDITIOS (OTHER THAN WORKMEN) AS VERIFIED BY RESOLUTION				
16.	*Unrelated Parties*	*438.13*	*438.13*	*Nil*
17.	*Related Parties*	*60.75*	*Nil*	*Nil*
18.	*Statutory Liabilities*	*177.50*	*177.50*	*Nil*
19.	*Equity/ Working Capital Infusion*	*NA*	*350*	*Nil*
TOTAL		*7289.05*	*7568.89*	*381.62*
Total Amount with Interest		***7950.34***		

19. From the gist aforesaid, it will be evident that the 'Financial Creditors' such as, 'Edelweiss Asset Reconstruction Company Limited', 'IDBI Bank

Limited', 'Bank of Baroda', 'Canara Bank', 'Bank of India' and 'State Bank of India' has been provided with 100% of their verified claim, the 'Resolution Applicant' ('Rajputana Properties Private Limited') has given lesser percentage to Export-Import Bank of India (72.59%) and State Bank of India-Hong Kong (10%). Discrimination has been made on the ground that some of the 'Financial Creditors' are direct exposure to the 'Corporate Debtor' or some of the 'Financial Creditors' to whom the 'Corporate Debtor' was guarantor. Even the guarantors who are treated to be the 'Financial Creditors', such as 'IDBI Bank Limited (Dubai Branch)', 'Bank of Baroda (London)', 'State Bank of India (Bahrain)', 'Syndicate Bank' have been provided with 100% proposed payment of their verified claim but the 'Export-Import Bank of India' and the 'State Bank of India (Hong Kong)' who are similarly situated have been discriminated.

20. Learned Senior Counsel appearing on behalf of the 'Rajputana Properties Private Limited' submitted that the 'Exim Bank' has been allotted 72.59% as the principal borrower is 'Binani Industries Limited' which itself is a non-performing asset and facing proceedings under the 'I&B Code'.

With regard to claim of 'State Bank of India (Hong Kong)', it was submitted that it could not be paid in full as 'Rajputana Properties Private Limited' was never granted the opportunity to undertake diligence of the underlying plans in China despite repeated requests. Therefore, no opportunity to appropriately analyse the commercial viability.

21. Though the aforesaid explanation seems to be attractive but such ground cannot be taken to discriminate between two same sets of the Creditors namely the 'Financial Creditors' who are similarly situated as guarantors.

22. In so far as the 'Operational Creditors' (other than workmen) are concerned, it will be seen that 'unrelated parties' have been provided with 35% of their verified claim which is about Rs. 90 crores. However, 'related parties' have not been provided with any amount. The breakup of payments to the 'Operational Creditors' has been shown as follows:

"(a)Trade creditors with o/s of less than Rs. 1 Crore are being paid 100% of their verified claims and form 98.5% of the total trade creditors (i.e. approximately 2937 out of a total of 2988 creditors)

(b) Trade creditors with o/s of Rs. 1-5 Crores are being paid 40% or Rs. 1 Crore, whichever is higher (i.e. approximately 24 'Operational Creditors')

(c) Trade creditors with o/s of Rs. 5-10 Crores are being paid 25% or Rs. 2 Crores, whichever is higher (i.e. approximately 5 'Operational Creditors')

(d)Trade creditors with o/s of higher than Rs. 10 Crores are being paid 5% or Rs. 2.5 Crores, whichever is higher (i.e. approximately 10 'Operational Creditors')"

23. However, the 'I&B Code' or the Regulations framed by the Insolvency and Bankruptcy Board of India do not prescribe differential treatment

between the similarly situated 'Operational Creditors' or the 'Financial Creditors' on one or other grounds.

.....

29. We agree with the submissions made by Mr. Arun Kathpalia, learned Senior Counsel that Section 53, including explanation given therein cannot be relied upon while approving the 'Resolution Plan'. However, that does not mean that a discriminatory plan can be placed and can be got through on one or other ground, which is against the basic object of maximization of the assets of the 'Corporate Debtor' on one hand and for balancing the stakeholders on the other hand.

.....

43. From the two 'Resolution Plans', it will be clear that the 'Rajputana Properties Private Limited' in its 'Resolution Plan' has discriminated some of the 'Financial Creditors' who are equally situated and not balanced the other stakeholders, such as 'Operational Creditors'. Therefore, the Adjudicating Authority has rightly held the 'Resolution Plan' submitted by 'Rajputana Properties Private Limited' to be discriminatory.

.....

48. If the 'Operational Creditors' are ignored and provided with 'liquidation value' on the basis of misplaced notion and misreading of Section 30(2)(b) of the 'I&B Code', then in such case no creditor will supply the goods or render services on credit to any 'Corporate Debtor'. All those who will supply goods and provide services, will ask for advance payment for such supply of goods or to render services which

will be against the basic principle of the 'I&B Code' and will also affect the Indian economy. Therefore, it is necessary to balance the 'Financial Creditors' and the 'Operational Creditors' while emphasizing on maximization of the assets of the 'Corporate Debtor'. Any 'Resolution Plan' if shown to be discriminatory against one or other 'Financial Creditor' or the 'Operational Creditor', such plan can be held to be against the provisions of the 'I&B Code'.

17. In the order dated 24.07.2018 in CA 59 of 2018 (filed by the 'Resolution Professional' of 'Swadisht Oils P. Ltd'.) in CP No.(IB)13/ALD/2017 in the matter of '**J.R. Agro Industries P. Ltd'. Vs. 'Swadisht Oils P. Ltd.'** wherein it is observed as under:

> *"In the UNICITRAL report, it is specifically mentioned that similarly ranked creditors are treated equally. In the resolution plan, the recent dues of operational creditors have been given preference. The resolution plan provides hundred percent payment to the operational creditors whose claims are not more than six months old, whereas those creditors whose claims are more than 24 months old, has been provided with only 5% of the principal amount without any interest or penalty. The operational creditors, whose claims are more than 24 months old has been treated unequally. It shows that the plan is biased against the interest of those operational creditors, whose claims are more than 24 months old.*

We are of the considered opinion that there should be no discrimination among the same class of creditors. Explanation one of section 53 of IB code provides that <u>"it is here by clarified that at each stage of distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full;"</u>

All the operational creditors are rank equal. Therefore, there should be no discrimination in distribution of the payment among the same class of creditors. Therefore, the part of the resolution plan which discriminates the distribution of liquidation value amongst operational creditors is unsustainable in law. This portion the plant needs modification."

18. In the judgment of the **Hon'ble Supreme Court in ''Swiss Ribbons Pvt. Ltd. and Anr.' vs. 'Union of India and Ors.' (WP(C) 99 of 2018)** dated 25.01.2019 wherein at paragraph 45 and 46 it is observed as under:

45. "Quite apart from this, the United Nations Commission on International Trade Law, in its Legislative Guide on Insolvency Law [—UNCITRAL Guidelines‖] recognizes the importance of ensuring equitable treatment to similarly placed creditors and states as follows:

"Ensuring equitable treatment of similarly situated creditors

7. The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests. This key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor. This is less relevant as a defining factor where there is no specific debt contract with the debtor, such as in the case of damage claimants (e.g. for environmental damage) and tax authorities. Even though the principle of equitable treatment may be modified by social policy on priorities and give way to the prerogatives pertaining to holders of claims or interests that arise, for example, by operation of law, it retains its significance by 12 UNCITRAL Legislative Guide on Insolvency Law ensuring that the priority accorded to the claims of a similar class affects all members of the class in the same manner. The policy of equitable treatment permeates many aspects of an insolvency law, including the application of the stay or suspension, provisions to set aside acts and transactions and recapture value for the insolvency estate, classification of claims, voting procedures in reorganization and distribution mechanisms. An insolvency law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided.

46. The NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always gone into whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that

the operational creditors' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value. Further, on 05.10.2018, Regulation 38 has been amended. Prior to the amendment, Regulation 38 read as follows: —

38. Mandatory contents of the resolution plan.— (1) A resolution plan shall identify specific sources of funds that will be used to pay the—

(a) insolvency resolution process costs and provide that the [insolvency resolution process costs, to the extent unpaid, will be paid] in priority to any other creditor;

(b) liquidation value due to operational creditors and provide for such payment in priority to any financial creditor which shall in any event be made before the expiry of thirty days after the approval of a resolution plan by the Adjudicating Authority; and

(c) liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan.‖

Post amendment, Regulation 38 reads as follows: —

38. Mandatory contents of the resolution plan.— (1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors.

(1-A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

First Respondent Submissions

19. According to the Learned Counsel for the First Respondent, the 'Corporate Insolvency Resolution Process' (CIRP) in regard to the 'Corporate Debtor' was initiated upon the admission of an application filed by the *'State Bank of India'* as per Section 7 of the 'I&B' Code through an order dated 18.07.2017, passed by the 'Adjudicating Authority', in and by which the First Respondent was appointed as an 'Interim Resolution Professional' and was latter affirmed as the 'Resolution Professional' by the 'Committee of Creditors' at its First Meeting that took place on 16.08.2017. In fact, in terms of the ingredients of the 'I&B' Code, the 'Resolution Professional' carried out the 'Corporate Insolvency Resolution Process' (CIRP) of the 'Corporate Debtor' in consultation with the 'Committee of Creditors' of the 'Corporate Debtor' and that the 'Resolution Applicants' submitted a 'Resolution Plan' on 12.04.2018 which was approved by the 'Committee of Creditors' at its 16th Meeting that took place on 20.06.2018 by 72.192% majority. Hence, the 'Resolution Professional' filed I.A. 259 of 2018 on 11.07.2018 seeking approval of the 'Resolution Plan' and that the 'Resolution Plan' furnished by the 'Resolution

Applicant' was subsequently approved by the 'Adjudicating Authority' in terms of the approval order. Indeed, the 'Resolution Professional' had demitted his office as on the date of approval order on 08.03.2019 and in accordance with the provisions of the code, a 'Monitoring Committee' was put in place to manage and operate the 'Corporate Debtor' till 14.09.2020.

20. It is the submission of the Learned Counsel for the First Respondent/ erstwhile 'Resolution Professional' that the 'Resolution Professional' is not a Decision Making Body and is only a facilitator in the 'Corporate Insolvency Resolution Process' of the 'Corporate Debtor'. As a matter of fact, the 'Resolution Professional' is to give his ex-facie opinion as to whether the 'Resolution Plan' confirms to the ingredients of the 'I&B' Code. The 'Resolution Professional' is to place the 'Resolution Plan' before the 'Committee of Creditors', which may determine to approve or reject the same and in fact 'Resolution Professional' is to ensure that the 'Resolution Plan' is complete in all its aspects.

21. The Learned Counsel for the First Respondent brings it to the notice of this Court that as per the scheme of the 'I&B' Code (as amended on 06.06.2018 and as applicable at the relevant time period during the submission of the 'Resolution Plan') the only payment prescription as per Section 30(2) of the Code r/w Regulation 38 of the 'Insolvency and Bankruptcy Board of India' (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 (CIRP Regulations) again (as per the as per the law amended on 01.04.2018 and as prevailing during the submission of the 'Resolution Plan') was to provide a minimum of the amount that would have been due in the event of a Liquidation as per Section 53 of the Code, in priority to any

other payments being made to the 'Financial Creditors'. Besides this the 'I&B' Code had not stipulated any condition on payment terms under a 'Resolution Plan' in regard the 'Operational Creditors' under the Code.

22. The Learned Counsel for the First Respondent points out that the total admitted 'Financial Debt' of the 'Corporate Debtor' is Rs.29,523.86 crores and the total admitted 'Operational Debt' of the 'Corporate Debtor' (other than Workmen and Employees dues) is approximately Rs.1109.81 crores. Further, the average Liquidation value of the 'Corporate Debtor' is approximately is Rs.4433 crores as per the liquidation value estimated by the two valuers appointed by the 'Resolution Professional'. Accordingly, the Liquidation value due to the 'Operational Creditors' is Nil. Considering that upon an application of the waterfall mechanism mentioned under Section 53 of the code, the whole sum of Rs.4433 crores would be exhausted in payment of the 'Corporate Insolvency Resolution Process', 'Costs', 'Liquidation Costs', 'Workmen' dues and the dues owed to the 'Secured Creditors' (i.e. 'Financial Creditors') which are substantially in excess of Rs.4433 crores.

23. The Learned Counsel for the First Respondent cites the decision of ***Hon'ble Supreme Court in 'Swiss Ribbon Pvt. Ltd. & Anr'. V. 'Union of India & Ors.' (Writ Petition (Civil) 99 of 2018),*** wherein it is observed and held that *'a Resolution Plan cannot pass muster under Section 30(2)(b) read with Section 31 unless a minimum payment is made to operational creditors, being not less than liquidation value due to them.'*

On behalf of the 1st Respondent, the amounts purportedly claimed by the numerous creditors and admitted by it is shown in tabular form as under:-

A	Financial Creditor	29595.13 (cr.)	29523.86 Rs. (cr.)
B	Workman	24.51	19.33
C	Employees	63.17	53.68
D	Operational creditors other than Workmen and Employees	1406.57	1109.81
	Total	31089.38	30706.68

24. The break-up of the 'CIRP Cost' paid out under the 'Resolution Plan' runs to the following effect: -

Towards Interim Finance	241.10 Rs. (in Cr.)
Fee of the RP	0.49
Fee of the Professionals hired by RP	7.33
Other costs approved by the CoC	2.89
Total	251.81

25. It is worthwhile for this Tribunal to make a relevant mention that the average liquidation value of the Corporate Debtor amounts to 4433 crores in terms of the liquidation value estimated by the two valuers appointed by the Resolution Professional and the total financial outlay as per the Resolution Plan comes to Rs. 6252/- crores, and the break-up is as follows:-

Heading	Amounts paid (Rs. Cr.)
Total Financial Outlay under the Plan Liquidation value of the Corporate Debtor	6252 4433
Heading	Amount to be paid as per the Resolution Plan (in Cr.)
A.Towards CIRP Cost Paid (Maximum amount provided for Rs. 284 Cr.)	251.81
B Financial Creditor	5052.00
C Workman	19.33

Employees (At the discretion of the Resolution Applicant)	53.68
D Operational creditors other than Workmen and Employees	4.83 [*Operational Creditors with admitted claim of up to Rs. 3 lakhs are to be paid in full]*
Total Claim (B+C+D)	5129.84
Towards Working Capital	370.35
Towards Capital Expenditure	500.00
Total	**6252.00**

26. The Learned Counsel for the First Respondent submits that while the 'Operational Creditors' were entitled to 'Nil' payment as per Section 30(2) of the Code in the instant case the 'Resolution Applicant' in their 'Commercial Wisdom' has provided for full payment (amounting to Rs.4.83 crores) under the approved 'Resolution Plan' for 'Operational Creditors' with admitted claims of an amount of upto Rs.3 lakhs. Furthermore, as likewise treatment of 'Operational Creditors' was seen in the case of 'Committee of Creditors' of ***'Essar Steel India Limited' vs. 'Satish Kumar Gupta', reported in 2019 Scc OnLine SC 1478*** wherein the 'Resolution Plan' submitted by the 'Successful Resolution Applicant' segregated the 'Operational Creditors' and proposed different amount payable to the different classes of 'Operational Creditors' such as 'Workmen' and 'Employees', 'Creditors' having admitted claims of less than Rs.1 crores and Creditors having claims of over Rs.1 crore and that the **Hon'ble Supreme Court** had upheld that the 'Resolution Plan' was in compliance with the provisions of the Code and the relevant Regulations and had approved the 'Resolution Plan' therein.

27. The Learned Counsel for the First Respondent contends that the 'Adjudicating Authority' has been tasked to be a process supervisor to ensure compliance with law and exercise restricted jurisdiction under the provisions

of the Code which are limited to the matters mentioned in Section 30(2) of the Code as observed by the **Hon'ble Supreme Court of India in the matter of K. Shashidhar vs. Indian Oversees Bank & Anr. (vide Civil Appeal 10673 of 2018 dated 05.02.2019)** and refers to paragraph 37 to 38, 44 wherein it is observed as under:

> *"37. On a bare reading of the provisions of the I&B Code, it would appear that the remedy of appeal under Section 61(1) is against an "order passed by the adjudicating authority (NCLT)" – which we will assume may also pertain to recording of the fact that the proposed resolution plan has been rejected or not approved by a vote of not less than 75% of voting share of the financial creditors. Indubitably, the remedy of appeal including the width of jurisdiction of the appellate authority and the grounds of appeal, is a creature of statute. The provisions investing jurisdiction and authority in the NCLT or 68 NCLAT as noticed earlier, has not made the commercial decision exercised by the CoC of not approving the resolution plan or rejecting the same, justiciable. This position is reinforced from the limited grounds specified for instituting an appeal that too against an order "approving a resolution plan" under Section 31. First, that the approved resolution plan is in contravention of the provisions of any law for the time being in force. Second, there has been material irregularity in exercise of powers "by the resolution professional" during the corporate insolvency resolution period. Third, the debts owed to operational creditors have not been provided for in the resolution plan in the prescribed manner.*

Fourth, the insolvency resolution plan costs have not been provided for repayment in priority to all other debts. Fifth, the resolution plan does not comply with any other criteria specified by the Board. Significantly, the matters or grounds - be it under Section 30(2) or under Section 61(3) of the I&B Code - are regarding testing the validity of the "approved" resolution plan by the CoC; and not for approving the resolution plan which 69 has been disapproved or deemed to have been rejected by the CoC in exercise of its business decision.

38. *Indubitably, the inquiry in such an appeal would be limited to the power exercisable by the resolution professional under Section 30(2) of the I&B Code or, at best, by the adjudicating authority (NCLT) under Section 31(2) read with 31(1) of the I&B Code. No other inquiry would be permissible. Further, the jurisdiction bestowed upon the appellate authority (NCLAT) is also expressly circumscribed. It can examine the challenge only in relation to the grounds specified in Section 61(3) of the I&B Code, which is limited to matters "other than" enquiry into the autonomy or commercial wisdom of the dissenting financial creditors. Thus, the prescribed authorities (NCLT/NCLAT) have been endowed with limited jurisdiction as specified in the I&B Code and not to act as a court of equity or exercise plenary powers.*

28. Further, the same was also upheld in the decision of ***Hon'ble 'Supreme Court in 'Pratap Technocrats (P) Ltd.' vs. 'Monitoring Committee of Reliance Infratel Ltd. and Anr.' (2021) Scc OnLine SC 569*** whereby and whereunder the **Hon'ble Supreme Court** at paragraph 34, 47 to 50 had observed and held that the ambit of the 'Adjudicating Authority' is to determine whether the amounts distributed to the 'Operational Creditors' are in consonance with Section 30(2)(b) of the Code and there does not lie any independent equity based jurisdiction with the 'Adjudicating Authority':

> *" 34.These provisions indicate that the ambit of the Adjudicating Authority is to determine whether the amount that is payable to the operational creditors under the resolution plan is consistent with the above norms which have been stipulated in clause (b) of sub-clause (2) of Section 30. Significantly, Explanation-1 to clause (b), which is clarificatory in nature, provides that a distribution which is in accordance with the provisions of the clause "shall be fair and equitable" to such creditors. Fair and equitable treatment, in other words, is what is fair and equitable between the operational creditors as a class, and not between different classes of creditors. The statute has indicated that once the requirements of Section 30(2)(b) are fulfilled, the distribution in accordance with its provisions is to be treated as fair and equitable to the operational creditors.*
>
> .....
>
> *47. These decisions have laid down that the jurisdiction of the Adjudicating Authority and the Appellate Authority cannot extend into entering upon merits of a business decision made by a requisite majority of the CoC in its commercial wisdom. Nor is there a residual equity based jurisdiction in the Adjudicating Authority or the Appellate Authority to interfere in this decision, so long as it is otherwise in conformity with the provisions of the IBC and the Regulations under the enactment.*

48. Certain foreign jurisdictions allow resolution/reorganization plans to be challenged on grounds of fairness and equity. One of the grounds under which a company voluntary arrangement can be challenged under the United Kingdom's Insolvency Act, 1986 is that it unfairly prejudices the interests of a creditor of the company (Sec.6–"Challenge of Decisions"). The United States' US Bankruptcy Code provides that if a restructuring plan has to clamp down on a dissenting class of creditors, one of the conditions that it should satisfy is that it does not unfairly discriminate, and is fair and equitable (Sec.1129-"Confirmation of a Plan"). However, under the Indian insolvency regime, it appears that a conscious choice has been made by the legislature to not confer any independent equity based jurisdiction on the Adjudicating Authority other than the statutory requirements laid down under sub-Section (2) of Section 30 of the IBC.

49. An effort was made by Mr. Dushyant Dave, learned Senior Counsel, to persuade this Court to read the guarantees of fair procedure and non-arbitrariness as emanating from the decision of this Court in Maneka Gandhi v. Union of India ({1978} 1 SCC 248) into the provisions of the IBC. The IBC, in our view, is a complete code in itself. It defines what is fair and equitable treatment by constituting a comprehensive framework within which the actors partake in the insolvency process. The process envisaged by the IBC is a direct representation of certain economic goals of the Indian economy. It is enacted after due deliberation in Parliament and accords rights and obligations that are strictly regulated and coordinated by the statute and its regulations. To argue that a residuary jurisdiction must be exercised to alter the delicate economic coordination that is envisaged by the statute would do violence on its purpose and would be an impermissible exercise of the Adjudicating Authority's power of judicial review. The UNCITRAL, in its Legislative Guide on Insolvency Law, has succinctly prefaced its recommendations in the following terms:-

"C. 15. Since an insolvency regime cannot fully protect the interests of all parties, some of the key policy choices to be made when designing an insolvency law relate to defining the broad goals of the law (rescuing businesses in financial difficulty, protecting employment, protecting the interests of creditors, encouraging the development of an entrepreneurial class) and achieving the desired balance between the specific objectives identified above. Insolvency laws achieve that balance by reapportioning the risks of insolvency in a way that suits a State's economic, social and political goals. As such, an insolvency law can have widespread effects in the broader economy."

50. Hence, once the requirements of the IBC have been fulfilled, the Adjudicating Authority and the Appellate Authority are duty bound to abide by the discipline of the statutory provisions. It needs no emphasis that neither the Adjudicating Authority nor the Appellate Authority have an unchartered jurisdiction in equity. The jurisdiction arises within and as a product of a statutory framework.

29. The Learned Counsel for the First Respondent refers to the judgment of the ***Hon'ble Supreme Court in the matter of 'Arcelor Mittal India Pvt. Ltd.' vs. 'Satish Kumar Gupta & Ors.' reported in (2019) 2 SCC at page 1,*** **wherein at paragraph 80,** it is held as under: -

"80. It is the Committee of Creditors which will approve or disapprove a resolution plan, given the statutory parameters of Section 30. Under Regulation 39 of the CIRP Regulations, subclause (3) thereof provides:- "(3) The committee shall evaluate the resolution plans received under sub-regulation (1) strictly as per the 122 evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit: Provided that the committee shall record the reasons for approving or rejecting a resolution plan." This regulation shows that the disapproval of the Committee of Creditors on the ground that the resolution plan violates the provisions of any law, including the ground that a resolution plan is ineligible under Section 29A, is not final.

The Adjudicating Authority, acting quasi-judicially, can determine whether the resolution plan is violative of the provisions of any law, including Section 29A of the Code, after hearing arguments from the resolution applicant as well as the Committee of Creditors, after which an appeal can be preferred from the decision of the Adjudicating Authority to the Appellate Authority under Section 61."

30. The Learned Counsel for the First Respondent submits that the 'Resolution Professional' in compliance with his duties as per the 'I&B' Code and the 'Corporate Insolvency Resolution Process' (CIRP) Regulations had duly confirmed the *prima facie* compliance of the 'Resolution Plan' coupled with Section 30(2)(b) of the Code and Regulation 38 of the 'CIRP' Regulations, and as such, there is no ground for initiating any disciplinary proceedings against the First Respondent.

Second and Third Respondent(s) Pleas

31. The Learned Counsel for the Second Respondent contends that the Appellant is an 'Operational Creditors' of the 'Corporate Debtor', with an admitted claim of 506.42 crores and has questioned the treatment of the claims of the 'Operational Creditors' as per 'Resolution Plan' dated 12.04.2018.

32. The Learned Counsel for the Second Respondent points out that the Respondent Nos. 2 and 3 along with **JMARC – March 2018 – Trust (Successful Resolution Applicants)** do constitute the resolution consortium which was declared as the 'Successful Resolution Applicant' by the 'Adjudicating Authority' ('National Company Law Tribunal', Ahmedabad Bench) as per order dated 08.03.2019.

33. According to the Learned Counsel for the Respondent Nos.2 and 3 that the 'Liquidation Value' available to the 'Corporate Debtors', 'Operational Creditors' is Nil and as such, the 'Operational Creditors' (including the Appellant) were not entitled to receive any sum as per Section 30(2)(b) of the Code r/w Regulation 38 of CIRP Regulations. Also it is represented on behalf of the Respondent Nos.2 and 3 that in any event their claim was not towards any real supply of ***'Goods'*** *or* ***'Services'***, but was in respect of '*take or pay obligation'* under a contract with the 'Corporate Debtor' (Alok Industries Ltd.) which was in the nature of advance towards future supplies and not ***'Goods'*** *or* ***'Services'.***

34. The Learned Counsel for the Second and Third Respondents points out that their 'Resolution Plan', including the 'provisions for payment' against the 'Operational Creditors' claims contemplated thereunder complies with the provisions of the Code and is also approved by the 'Committee of Creditors' of the 'Corporate Debtor' in its 'Commercial Wisdom' and the 'Adjudicating Authority' as per order passed in March 2019.

35. The Learned Counsel for the Second and Third Respondent takes a plea that the 'Liquidation Value' amounting to Rs.4433 crores could be exhausted towards payment of the CIRP costs and the admitted *'Financial Debt'* amounting to Rs. 29,523.86 crores in accordance with Section 53 of the Code r/w Regulation 35 of the 'Insolvency and Bankruptcy Board of India' (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) is Nil. (Vide Clause 3.3.1 of the Resolution Plan).

36. The Learned Counsel for the Second and Third Respondent adverts to Clause 3.3.1 of the 'Resolution Plan', which provides for the payment of amount to the 'Operational Creditors' and the relevant portion runs as under:

> 3.3.1 ***"Amount to be paid to Operational Creditors pursuant to this Plan***
>
> *As per the Information Memorandum, the liquidation value of the Company is Rs. 4433,00,00,000 (Rupees Four Thousand Four Hundred Thirty Three Crores only), which is less than the sum of Estimated CIRP Costs and Outstanding Financial Debt, therefore, the liquidation value available to Operational Creditors (other than employees and workmen who have been dealt with separately under Section 3.4 below; and (ii) the dues owed by the Company to certain Operational Creditors (to each of whom the Company, as on the Insolvency Commencement Date, owes up to Rs. 3,00,000 (Rupees Three Lakhs) and whose details are set out in Annexure 9), which dues aggregates to Rs. 4,83,47,321 (Rupees Four Crores Eighty-Three Lakhs Forty-Seven Thousand Three Hundred Twenty-One). If any further claims of Operational Creditors (other than employees and workmen who have been dealt with separately under Section 3,4 below), relating to the period prior to the Closing Date arise and/or are made and/or are admitted, then the amounts payable under this Plan to the Operational Creditors (other than (i) employees and workmen who have been dealt with separately under Section 3,4 below; and (ii) the dues owed by the Company to certain Operational Creditors(in each of whom the Company, as on the Insolvency Commencement Date, owes up to Rs.*

3,00,000 (Rupees Three Lakhs) and whose details are set out in Annexure 9), which aggregates to Rs. 4,83,47,321(Rupees Four Crores Eighty Three Lakhs Forty Seven Thousand Three Hundred Twenty One) shall remain NIL and shall not increase."

37. The Learned Counsel for the Second and Third Respondent points out that the 'Operational Creditors' as per Section 32(b) of the 'I&B' Code r/w Regulation 38 of CIRP Regulations are entitled to receive only such amounts payable to them, in the event of liquidation of the 'Corporate Debtor', as computed in terms of Section 53 of the Code and as such the Appellant is not entitled to receive any amount(s) since the liquidation value available to the 'Operational Creditors' is Nil.

38. At this stage, the Learned Counsel for Second and Third Respondent submits that the 'Resolution Applicants' in good faith and despite not bound under any legal obligation to do so, allocated a sum of Rs.4.83 crore towards payment of dues of those 'Operational Creditors', whose admitted claims were upto Rs.3 lakhs. Such treatment had resulted in debts of 357 'Operational Creditors' being satisfied in full and that the acceptance of the allocation of this amount in respect of the 'Operational Debt' of the 'Corporate Debtor' was a bonafide exercise of the 'Commercial Wisdom' of the 'Committee of Creditors'.

39. The Learned Counsel for the Second and Third Respondent refers to the judgment in '**Standard Chartered Bank' vs. 'Resolution Professional of Essar Steel Limited and Ors.' (vide Comp. App. (AT) (Ins.) 242 of 2019) wherein at paragraphs at 177 and 178** it is observed as under:

177. For the aforesaid reasons, if the employees are given 100% of their dues or those who have 'supplied goods' and 'rendered services' having claim less than Rs.1 Crore are provided with 100% dues of their claim amount as provided in the present case, the other 'Operational Creditors' whose claim are more than Rs. 1 Crore or the 'Central Government' or the 'State Government' or the 'Local Authority', who raise their claim on the basis of the statutory dues, they cannot ask for same treatment as allowed in favour of the aforesaid class of 'Operational Creditors'.

178. For the said reasons, we hold that 100% payment as suggested in the 'Resolution Plan' in favour of the workmen and employees, 'Unsecured Financial Creditor' whose claim is less than Rs. 1 Crore and the 'Operational Creditors' whose admitted claim is less than Rs. 1 Crore are not discriminatory and the other 'Operational Creditors' or 'Financial Creditors' cannot ask for 100% of their claim on the ground that they should also be provided with same treatment.

40. The Learned Counsel for the Second and Third Respondent refers to the decision of ***Hon'ble Supreme Court in 'Committee of Creditors of Essar Steel Limited' vs. 'Satish Kumar Gupta', reported in (2019) Scc OnLine SC1478, wherein at paragraph 142*** it is observed as under:

"142. It is also not possible to accept Shri Sibal's submission that the resolution plan must itself provide for distribution inter se between secured financial creditors. It is enough that under the Code and the Regulations, the resolution plan provides for distribution of amounts payable towards debts based upon a classification of various types of creditors. This both the original plan as well as the negotiated

plan of ArcelorMittal have already done, as has been seen by us hereinabove, both plans containing the amount to be paid to workmen separately, operational creditors of INR 1 crore and less separately, operational creditors of INR 1 crore and over separately and financial creditors, subdivided into secured and unsecured as sub-classes, separately. All that was left for distribution by ArcelorMittal was distribution inter se between secured financial creditors which was then done by a majority of 92.24%, as has been seen above based upon the value of their respective security interests. Therefore, the allegation that the Committee of Creditors relieved Arcelor Mittal from the solemn offer made before the Supreme Court by reducing the offer amount of INR 42,000 crores by INR 2,500 crores so that Arcelor Mittal could acquire the debts of OSPIL, is again a matter for negotiation being a business decision taken by the Committee of Creditors with Arcelor Mittal. In any case ultimately INR 35,000 crores was upped to INR 42,000 crores, it being made clear in the final resolution plan that upfront payment of INR 42,000 crores is a committed amount, even if working capital adjustment turns out to be below INR 2,500 crores."

41. The Learned Counsel for the Second and Third Respondent forcefully projects an argument that the 'Resolution Plan' in the instant case which conceive 100% payment to the 'Operational Creditors' with claim upto Rs.3 lakhs is not discriminatory or in violation of ***'Article 14 of the Constitution of India'*** or the provisions of the Code or Regulations made thereunder.

42. The Learned Counsel for the Respondent Nos.2 and 3 points out that under the 'Gas Sale Agreement' dated 27.05.2013 ('GSA') the 'Corporate Debtor' was required to pay to the Appellant (in addition to the price of Gas utilised by the 'Corporate Debtor', the weighted average contract price for 90% of the gas delivered by the Appellant and not utilised by the 'Corporate Debtor').

43. It is the version of the Learned Counsel for the Respondent Nos.2 and 3 that the 'Gas Sale Agreement' had provided that the 'Corporate Debtor' can utilise the outstanding annual take or pay deficiency by availing gas free of cost at any time during the contract period for which payment was made by the 'Corporate Debtor'. Because of this, it is represented on behalf of the 'Resolution Applicant' that the Appellant's claim was in regard to the advance towards future supply and not towards provisions of any '***Goods'*** or '***Services'***.

44. The Learned Counsel for Respondent Nos.2 and 3 submits that as there was no payment made under the take or pay obligation of 'Gas Sale Agreement', the 'Corporate Debtor' could not claim any future supplies free of cost and also an affidavit dated 28.01.2019 was filed before the 'Adjudicating Authority' in I.A. No.41 of 2019 clarifying that the 'Resolution Applicants' will not raise any claims in the event of the 'Adjudicating Authority' approving the 'Resolution Plan'.

45. The Learned Counsel for the Respondent Nos.2 and 3 contends that the opinion of commercial arrangement expressed by the 'Committee of Creditors' after due deliberations through voting, as per voting shares, is a collective business decision and in the instant case, the 'Resolution Plan' which

envisages the amount and the manner of repayment of the dues of the 'Operational Creditors' stands accepted and duly approved by the 'Committee of Creditors'.

46. The Learned Counsel for the Second and Third Respondents relies on the decision of the ***Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC (India) Ltd. reported in (2021) SccOnLine SC 253, wherein at paragraph 200 to 204*** it is observed as under:

> *200. In the aforesaid backdrop, the matter was considered in appeal filed by the resolution applicant. After having examined the relevant provisions of the Code and the CIRP Regulations as also the enunciations in Essar Steel (supra), this Court observed that there was no provision in the Code or Regulations under which the bid of any resolution applicant has to match the liquidation value; that the object behind such valuation process was to assist the CoC to take a proper decision on the resolution plan; and once the plan was approved by CoC, the Adjudicating Authority was only to ascertain if the resolution plan was meeting the requirements of subsections (2) and (4) of Section 30. The Court observed that in the given case, the Appellate Authority had proceeded on equitable perceptions rather than commercial wisdom. Even while observing that release of assets at the value 20% below the liquidation value arrived by valuers appeared inequitable, this Court observed that the adjudicatory process ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. While disapproving interference*

by the Appellate Authority, this Court observed and held under:—

"27. Now the question arises as to whether, while approving a resolution plan, the adjudicating authority could reassess a resolution plan approved by the Committee of Creditors, even if the same otherwise complies with the requirement of Section 31 of the Code. The learned counsel appearing for Indian Bank and the said erstwhile promoter of the corporate debtor have emphasised that there could be no reason to release property valued at Rs. 597.54 crores to MSL for Rs. 477 crores. The learned counsel appearing for these two respondents have sought to strengthen their submission on this point referring to the other resolution applicant whose bid was for Rs. 490 crores which is more than that of the appellant MSL.

28. No provision in the Code or Regulations has been brought to our notice under which the bid of any resolution applicant has to match liquidation value arrived at in the manner provided in Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. This point has been dealt with in Essar Steel. We have quoted above the relevant passages from this judgment.

29. It appears to us that the object behind prescribing such valuation process is to assist the CoC to take decision on a resolution plan properly. Once, a resolution plan is approved by the CoC, the statutory mandate on the adjudicating authority under Section 31(1) of the Code is to ascertain that a resolution plan meets the requirement

of sub-sections (2) and (4) of Section 30 thereof. We, per se, do not find any breach of the said provisions in the order of the adjudicating authority in approving the resolution plan.

*30**. The appellate authority has, in our opinion, proceeded on equitable perception rather than commercial wisdom. On the face of it, release of assets at a value 20% below its liquidation value arrived at by the valuers seems inequitable. Here, we feel the Court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis. Such is the scheme of the Code**. Section 31(1) of the Code lays down in clear terms that for final approval of a resolution plan, the adjudicating authority has to be satisfied that the requirement of sub-section (2) of Section 30 of the Code has been complied with. The proviso to Section 31(1) of the Code stipulates the other point on which an adjudicating authority has to be satisfied. That factor is that the resolution plan has provisions for its implementation. The scope of interference by the adjudicating authority in limited judicial review has been laid down in Essar Steel, the relevant passage (para 54) of which we have reproduced in earlier part of this judgment. The case of MSL in their appeal is that they want to run the company and infuse more funds. In such circumstances, we do not think the appellate authority ought to have interfered with the order of the adjudicating authority in directing the successful resolution applicant to enhance their fund inflow upfront." (emphasis in bold supplied)*

201. The expositions aforesaid make it clear that the decision as to whether corporate debtor should continue as a going concern or should be liquidated is essentially a business decision; and in the scheme of IBC, this decision has been left to the Committee of Creditors, comprising of the financial creditors. Differently put, in regard to the insolvency resolution, the decision as to whether a particular resolution plan is to be accepted or not is ultimately in the hands of the Committee of Creditors; and even in such a decision making process, a resolution plan cannot be taken as approved if the same is not approved by votes of at least 66% of the voting share of financial creditors. Thus, broadly put, a resolution plan is approved only when the collective commercial wisdom of the financial creditors, having at least 2/3 majority of voting share in the Committee of Creditors, stands in its favour.

202. In the scheme of IBC, where approval of resolution plan is exclusively in the domain of the commercial wisdom of CoC, the scope of judicial review is correspondingly circumscribed by the provisions contained in Section 31 as regards approval of the Adjudicating Authority and in Section 32 read with Section 61 as regards the scope of appeal against the order of approval.

203. Such limitations on judicial review have been duly underscored by this Court in the decisions above-referred, where it has been laid down in explicit terms that the powers of the Adjudicating Authority dealing with the resolution plan do not extend to examine the correctness or otherwise of the commercial wisdom exercised by the CoC. The limited judicial review available to Adjudicating Authority lies within the four corners of Section 30(2) of the Code, which would essentially be to examine that the

resolution plan does not contravene any of the provisions of law for the time being in force, it conforms to such other requirements as may be specified by the Board, and it provides for : (a) payment of insolvency resolution process costs in priority; (b) payment of debts of operational creditors; (c) payment of debts of dissenting financial creditors; (d) for management of affairs of corporate debtor after approval of the resolution plan; and (e) implementation and supervision of the resolution plan.

204. The limitations on the scope of judicial review are reinforced by the limited ground provided for an appeal against an order approving a resolution plan, namely, if the plan is in contravention of the provisions of any law for the time being in force; or there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period; or the debts owed to the operational creditors have not been provided for; or the insolvency resolution process costs have not been provided for repayment in priority; or the resolution plan does not comply with any other criteria specified by the Board.

Fourth Respondent's Contentions

47. According to the Learned Counsel for the Fourth Respondent/ 'Committee of Creditors', as per common order dated 08.03.2019 in I.A. No.41 of 2019 and I.A. 259 of 2018 were determined by the 'Adjudicating Authority', culminating in approval of the 'Resolution Plan' furnished by the Respondent Nos.2 and 3 and rejection/ dismissal of Appellant's I.A. 41 of 2019.

48. The Learned Counsel for the Fourth Respondent contends that the instant Appeal is an infructuous since the regulatory findings of the

'Corporate Debtor' indicate that the approved 'Resolution Plan' was fully implemented under the *'Monitoring Committee'* supervising the implementation was dissolved. Moreover, the letter dated 15.09.2020 by the 'Corporate Debtor' to BSE Limited and 'National Stock Exchange of India Ltd'. under Regulation 30 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 conforms that "…with reconstitution of the Board, Monitoring Committee stands dissolved".

49. The Learned Counsel for the Fourth Respondent seeks in aid of the judgment of this Tribunal in Comp. App. (AT) (Ins.) 67 of 2020 wherein at paragraph 6 it is observed as under:

> 6. " *The order dated 8th March, 2019 by which the 'Resolution Plan' was approved by the Adjudicating Authority is not under challenge in these appeals. In absence of any challenge, the said plan has reached finality. After the plan has reached finality, it is binding on all the stakeholders including the 'Operational Creditors', 'Financial Creditors' and others. How the distribution is to be made on the basis of the approved plan is for the Monitoring Committee to see. No individual decision can be given either by the Adjudicating Authority or by this Appellate Tribunal on the basis of individual claim of one or other 'Operational Creditors', 'Financial Creditors' and others after such approval, once the matter is brought to the notice of the Adjudicating Authority and this Appellate Tribunal by the 'Resolution Professional' on behalf of the Monitoring Committee that the 'Corporate Insolvency Resolution Process Costs' have been paid".*

50. The Learned Counsel for the Fourth Respondent takes a stand that once the 'Resolution Plan' was implemented there is no reason to interfere with or

to wind back such an approved and implemented 'Resolution Plan'. In fact, the contention of the Learned Counsel for the Fourth Respondent is that the present Appeal is not maintainable and also the same being an infructuous one.

51. The Learned Counsel for the Fourth Respondent contends that the distribution of the amounts under 'Resolution Plan' falls within the ambit of exercise of 'Commercial Wisdom' by the 'Committee of Creditors', and hence it is beyond interference.

52. The Learned Counsel for the Fourth Respondent refers to the decision of ***Hon'ble Supreme Court in the 'Committee of Creditors' of 'Essar Steel India Ltd.' v. 'Satish Kumar Gupta' (2020) 8 SCC at page 531, wherein at paragraph 128*** it is observed as under:

> 128. *"Section 53 is only referred to in order that a certain minimum figure be paid to different classes of operational and financial creditors. It is only for this purpose that Section 53(1) is to be looked at as it is clear that it is commercial wisdom of the Committee of Creditors that is free to determine what amounts be paid to different classes and sub-classes of creditors in accordance with the provisions of the Code and the Regulations made thereunder..."*

53. The Learned Counsel for the Fourth Respondent submits that the proceedings under the Code cannot be used for recovery of dues or for recovery of damages or to claim specific performance of a contract and in fact

and in reality the Appellant had initiated arbitration against the 'Corporate Debtor' in regard to its alleged claim of Gas Supply Agreement. Therefore, it is the contention of the Learned Counsel for the Fourth Respondent that instead of proceedings with the Arbitration proceedings, the Appellant has endeavoured to effect a recovery through the proceedings under the Code.

54. The Learned Counsel for the Fourth Respondent contends that the Appellant's claim pertains to claims arising out of the Corporate Debtor's purported obligation to pay for 'Goods', even where these were not availed of, as a so-called *'take of pay obligation'* and obviously, these disputes are contractual in nature.

55. The Learned Counsel for the Fourth Respondent points out that the 'Resolution Plan' deals with the Appellant's claim (vide Clause 3.3.6 (ii) and pursuant to that all claims arising out of the 'Gas Sale Agreement' pertaining to the period before the closing date) mentioned in the 'Resolution Plan' were immediately irrecoverably and conditionally 'extinguished' and 'waived' as on the closing date mentioned in the 'Resolution Plan'. In short, it is the clear cut stand of the Fourth Respondent that the Appellant has no claim as on date, despite the fact that the 'Resolution Plan' was fully implemented and prays for dismissal of the instant Appeal.

Analysis

56. According to the Appellant/Applicant in I.A. No. 41/2019 a 'Gas Sale Agreement' dated 27.05.2013 was executed by it and M/s. Alok Industries (Corporate Debtor) in respect of the supply of (Re-liquified Natural Gas) for a period of 15 years, coming to an end in 2028. Later, the 'Gas Transmissions Agreement' dated 27.05.2013 came to be executed together with all capacity

'Trench Agreement' between the Applicant and the 'Corporate Debtor' for the transportation of 'Re-liquified Natural Gas'.

57. Further, in terms of the Article 6, the 'Corporate Debtor' was required to take minimum quantity of gas of 0.185 MMSCMD (approx. average daily volume) against which the Applicant would raise the gas supply bills to the 'Corporate Debtor', to be repaid within 15 days by the 'Corporate Debtor'. Article 14 of the 'Gas Sale Agreement' pertains to the *'Take or Pay Obligation'* and Article 12.3 of the 'Gas Sale Agreement' provides the due date of payment.

58. The stand of the Appellant (Applicant in IA No. 41/2019) is that in terms of Article 14 of the 'Gas Sale Agreement', it claimed bills / letters in respect of 'TOP' charges/claimed the payment of gas as a 'Guarantee Demand' to the 'Corporate Debtor'. However, the 'Corporate Debtor' had not received / consumed it. The Appellant / Applicant in respect of unpaid contractual dues by the 'Corporate Debtor' in respect of the years 2014- 2016 had made a claim and the Appellant / Applicant, had projected Section 9 application (filed under the Arbitration and Reconciliation Act, 1996) before the ***'Civil Court of Dadra and Nagar Haveli'*** against the 'Corporate Debtor' and later the Arbitration Clause was invoked against the Appellant / Applicant through letter dated 16.05.2017 against the 'Corporate Debtor' for resolving the disputes as per 'Gas Sale Agreement' (in respect of all claims inclusive of TOP charges).

59. It is represented on behalf of the Appellant that Appellant / Applicant that the Appellant made a claim for Rs. 506.60 crores on 23.11.2017 before the 'Resolution Professional' and that the 'Resolution Professional' rejected the Appellant/Applicant's claim based on the reason that the *'Take or Pay Obligation'* under the 'Gas Sale Agreement' was not to be termed as

'Operational Debt', resting on the reason that the said obligation is not for the 'Goods' and 'Services' used for production or output turned out by the 'Corporate Debtor'. Besides this, the 'Resolution Professional' opined that any claim furnished after the lapse of 'CIRP' period was not to be considered.

60. The core plea taken on behalf of the Appellant/Applicant is that the 'Trade Creditors' were allotted only Rs. 4.83 crores and the said 'Trade Creditors' with balance of below Rs. 3 lacs were paid 100% of their verified claims and the remaining 'Trade Creditors' were provided with nil value.

61. The pivotal stand of the Appellant is that if the Appellant's interest is brushed aside in the 'Resolution Plan' it will affect the interests of 'Operational Creditors'. In fact, the proposed 'Resolution Plan' can be assailed as per Section 60(5) of the Code relating to (i) any claim made by or against the 'Corporate Debtor' or Corporate person, including claims by or against any of its subsidiaries situated in India and (ii) any question of priorities or any question of law or facts arising out of or in relation to the 'Insolvency Resolution' or 'Liquidation proceedings of the Corporate Debtor' or 'Corporate Person' under the 'I&B' Code.

62. On behalf of the Respondent, it is projected before this Tribunal that the 'Resolution Plan' got the nod of approval by the 'Committee of Creditors' during June, 2018 and the I.A. 41/2019 was projected by the Appellant/Applicant very lately and during the 'Corporate Insolvency Resolution Process' (CIRP) of the 'Corporate Debtor' the Appellant / Applicant had not expressed its objections in regard to the 'Resolution Plan'. Moreover, the 'Corporate Debtor' had not utilised the gas subsequent to January, 2014.

63. Continuing Further, it is the stand of the Respondents that the 'Supremacy of the Committee of Creditors' and their 'Commercial Wisdom' are not to be challenged and further that the 'Adjudicating Authority' has no jurisdiction to gauge the said 'Commercial Wisdom' of the 'Committee of Creditors'.

64. It is represented on behalf of the Appellant that the Adjudicating Authority had not noticed the fact that the Resolution Plan is at the threshold is discriminatory and crates a 'class within a class', which classification is without any intelligible criteria. Further, it is the plea of the approval of the Resolution Plan by the Adjudicating Authority is in violation of the provisions of the I&B Code. Moreover, the stand of the 'Appellant' is that, it being an operational creditor (without any voting right in the Committee of Creditors) was at a disadvantageous position by disentitling it of any payment in respect of the Resolution Plan, pertaining to its legitimate Claims.

65. The crux of the plea of the 1st Respondent (former Resolution Professional of Alok Industries Ltd) is that the average liquidation value of the Corporate Debtor comes to Rs.4,433/_ crores (in terms of the liquidation value estimated by two valuers appointed by the Resolution Professional) and the total financial outlay in terms of the Resolution Plan is Rs.6252/- crores.

66. The clear cut stand of the 1st Respondent is that upon an application of the "Waterfall Mechanism' under the Head 'Distribution of Assets' in terms of the ingredients of Section 53 of the I&B Code, 2016, the sum of Rs.4433 crores (Liquidation value) will be exhausted as regards the payment of the Insolvency Resolution Process costs, workmen dues and the dues to be paid to the 'Financial Creditors', which are above Rs.4433 crores.

67. Although, according to the 1st Respondent, 'Operational Creditors were entitled to 'Nil' payment as per Section 32 of the Code, the fact of the matter is that the 'Resolution Applicants' in their commercial wisdom had provided for the full payment of Rs.4.83 crores in respect of 'Approved Resolution Plan' for 'Operational Creditors' with admitted claims of a sum of rupees upto Rs.3 Lakhs only.

68. The plea of 2nd and 3rd Respondent is that the 'Resolution Applicant' based on 'Good Faith' a sum of Rs.4.83 crores was allotted in respect of payment of dues relating to debt of 'Operational Creditors' post admitted claims were upto Rs.3 Lakhs and this allocation had culminated in the debts of Operational Creditors numbering 357 were fulfilled in entirety. Added further, the said allotment of the aforesaid sum in respect of the operational debt of the Corporate Debtor was made Bona fide by the 'Committee of Creditors' exercising their 'Commercial Wisdom'.

69. According to the Learned Counsel for the 4th Respondent, the 'Distribution of amounts' in respect of a Resolution Plan comes within the ambit of the Committee of Creditors while exercising their 'commercial wisdom' and in short, the proceeding under the I&B Code, 2016(being summary in character) is not to be resorted to as an 'Debt Enforcement Procedure'. Also that, the Appellant's claim(s) pertain to the same being arising out of the Corporate Debtor's purported obligations to pay for goods, and obviously, the disputes are of contractual in nature.

70. Furthermore, it is the stand of the 4th Respondent that the instant 'Appeal' of the 'Appellant' has become an 'Infructous' one because of the fact

that the Resolution Plan was implemented and that the 'Monitoring Committee' was dissolved.

71. As far as the present case is concerned, although on behalf of the 'Appellant' a plea is raised that the 'Appellant' was discriminated as an 'Operational creditor' and that the 'Equality Concept' was not adhered to by the 'Adjudicating Authority' while approving the 'Resolution Plan' (especially in the teeth of the 'Resolution Plan' 100% payment to the 'Operational Creditors' with claim upto Rs. 3 Lakhs were admitted), this Tribunal, is of the considered opinion that the 'Operational Creditors' were paid as per Section 30(2) (b) of the I&B Code, 2016, and coupled with Regulation 38 of the 'CIRP Regulations' the 'Operational Creditors' are entitled to receive only such money that are payable to them as per Section 53 of Code.

72. In reality, there is no embargo for the classification of Operational creditor(s) into separate/different classes for deciding the way in which the money is to be distributed to them by the 'Committee of Creditors' because of the fact, undoubtedly, they do have the subjective final discretion of 'Collective Commercial Wisdom' in relation to (1) The amount to be paid (2) The quantum of money to be paid, to a certain category or the incidental category of creditors, of course, nicely balancing the interests of the 'Stakeholders' and the 'Operational Creditors', as the case may be. Suffice it for this Tribunal to pertinently make a significant mention that it cannot be lost sight of that the 'Appellant's' claim is not relatable to the supply of goods or services so as to keep the 'Corporate Debtor' as a 'Going Concern'. It is to be remembered that the ''Appellant' had commenced 'Arbitration proceedings' in regard to its claim emanating from the 'Gas Sale Agreement'. In fact, the

'Appellant's' claim pertains to supposed obligation to pay for goods, even where, these were not made use of as "take or pay obligation'. Looking at from any angle, the impugned order dated 08.03.2019 passed by the Adjudicating Authority (National Company Law Tribunal), Ahmedabad Bench in dismissing the I.A. 41/2019 in IA 259/2018 (filed by the Applicant for Appellant) in CP (IB)48/2017 does not suffer from any material irregularity or patent illegality in the eye of Law. Resultantly the instant 'Appeal' sans merits.

Result:

In fine, Comp. App. (AT)(Ins) No.492/2019 is dismissed. No costs. I.A. 1542/2019 (Stay Application) is closed.

[Justice M. Venugopal]
Acting Chairperson

[Dr. Ashok Kumar Mishra)
Member (Technical)

4th October, 2021
Shashi